No. 85-1439

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

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The Third Circuit held that confidential peer review materials of a liberal arts college enjoy no First Amendment protection from an EEOC administrative subpoena and ordered petitioner to provide the government with all confidential materials relating to every faculty tenure decision made during the four-year period of Montbertrand's employment with the College. Petitioner seeks plenary review because, as the Third Circuit itself recognized, its rule of law is in sharp contrast to the rules announced by two other circuit courts and because, by according petitioner's First Amendment rights no weight, the Third Circuit's decision is in conflict with decisions of this Court. The EEOC does not and could not dispute that the rules announced by the courts of appeals are in conflict and that petitioner's First Amendment rights, although infringed by the blanket EEOC subpoena, were accorded no weight by the court below.

Given these concessions, petitioner frankly would have expected the EEOC to acquiesce in the petition and ask the Court to grant certiorari in this case. Instead, the EEOC has lamely asked the Court to postpone reviewing this issue until some future case; its reasons for this suggestion warrant a brief reply.

1. In its brief, the EEOC ignores the court of appeals' express statement that its rule of law departed fundamentally from the approach taken in both the Second and Seventh Circuits. Pet. App. 8a. Nor does the EEOC deny that the basic approach taken in the Seventh and Second Circuits—both in recognizing that the First Amendment in some measure protects confidential tenure deliberations and in balancing, either directly or through a limited privilege, the First Amendment interest in confidentiality against the government's need for discovery—conflicts sharply with the analysis of the court of appeals in this case. See *EEOC* v. *University of Notre Dame Du Lac*, 715 F.2d 331, 337 (7th Cir. 1983); *Gray* v. *Board of Higher Education*, 692 F.2d 901, 903 (2d Cir. 1982). See Pet. 9-12. Indeed, the EEOC concedes that the tests in the three circuits are in conflict. Opp. 10 ("varying" standards).

The government instead argues that the conflict does not warrant review by this Court for three reasons. First, it asserts that the conflict is "nascent." Opp. 5, 13. But, the EEOC does not explain why a *new* conflict in the circuits on a significant and recurring issue involving a First Amendment right is somehow undeserving of review by this Court. The EEOC never explains what this Court will gain by allowing the concededly unsettled state of the law to continue unresolved.

Why, then, should the government oppose certiorari in this case? There can be only one explanation. The government would prefer to have this Court decide this question of such obvious importance in a case in which the record does not so starkly demonstrate the extreme nature of the government's legal position. This record contains no evidence that Franklin and Marshall discriminated against Montbertrand because he is French. The brief in opposition points to no such evidence and there is none. What the record does show is that statistically Franklin and Marshall's tenure decisions have significantly favored foreign origin professors (Pet. 6 n.3), and that the decision on Montbertrand was based on his inadequate scholarship and other objective factors, of which he was informed.

The EEOC's rationale for ignoring the legitimate concerns of every college and university in the country to achieve uniformity in the scope of their First Amendment rights is even more incredible. According to the EEOC, the conflict in the circuits "will not be a problem" because each college "will have only one circuit standard with which to deal." Opp. 13. This rationale, of course, would eliminate the need for this Court ever to resolve a conflict among the circuits. Surely the government would not contend that a conflict-creating individual income tax decision should not be reviewed because the taxpayer lives in only one circuit. Moreover, the EEOC's position ignores the fact that most circuits have not decided the issue presented in this case, which means that academic institutions in those areas must labor under continued needless uncertainty waiting for the existing conflict among the circuits to age and that the other courts of appeals must waste scarce judicial resources deciding, in the absence of direction from this Court, which of the three conflicting approaches is correct. Finally, the EEOC makes no attempt to explain why the First Amendment's protections of academic freedom should turn solely on the fortuity of geography.

Second, the EEOC asserts (Opp. 11-12) that the subpoena in this case would have been enforced in both the Second and Seventh Circuits and therefore the Court can disregard the clear conflict in the legal standards and constitutional protections. But no other court of appeals

has ever ordered the wholesale disclosure of all confidential files for all candidates considered for tenure during the period of the charging party's employment.[1] Thus, this contention is purely speculative.

The argument is also incorrect. In *Gray*, the Second Circuit expressly stated that even the minimal intrusion into academic freedom authorized there (disclosure of names of tenure committee members) would not have been ordered if, as here, the academic institution had supplied the charging party with a statement of reasons for the denial of tenure. 692 F.2d at 906-908; Pet. 11. Under that reasoning there is no way the Second Circuit would have enforced the blanket subpoena issued by the EEOC here.

In *Notre Dame*, the University objected to the release of files unless they were "redacted," i.e., names and identifying characteristics could be removed by the University before disclosure. The court of appeals granted all the relief sought and only authorized release of redacted files because Notre Dame, which is many times larger than Franklin and Marshall,[2] had not objected to their release in that form. In so doing, the court of appeals made it clear that "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available [to the EEOC]." 715 F.2d at 337 n.4. No such initial showing has been made here, and therefore, the EEOC is plainly incorrect

[1] The EEOC incorrectly states that no court, except the Seventh Circuit, has upheld a claim that the academic institution's interests outweighed "a plaintiff's need for relevant information to prove a discrimination claim. . . ." Opp. 10. The Fourth Circuit in *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579, 581, cert. denied, 434 U.S. 904 (1977), upheld the district court's refusal to permit the plaintiff to discover the College's tenure review materials on a college-wide basis.

[2] The EEOC has ignored the uncontested claim of the petitioner that redaction is a meaningless protection for a college as small as Franklin and Marshall.

in arguing that the Seventh Circuit would have enforced the subpoena in this case under its qualified privilege test.

In sum, the only way to determine whether petitioner's confidential records would be disclosed under the constitutional standards used in other courts of appeals is for this Court to grant the petition, reject the loose relevance standard employed below and subject the files to the more rigorous scrutiny employed in the Second and Seventh Circuits.

Finally, the EEOC implies (Opp. 13) that this Court's "intervening" decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), might cause the courts of appeals to rethink their rules which restrict the EEOC's access to confidential tenure information. But *Shell Oil* merely construed Title VII and its implementing regulations; it did not involve any claim based on the First Amendment and the Court was not asked to resolve the tension between any constitutional rights and Title VII. Thus, *Shell Oil* is totally irrelevant to the question presented in this case of how to reconcile the tension between the First Amendment right to confidential tenure deliberations and the broad sweep of Title VII. See Pet. App. 15a, 24a-25a (Aldisert, C.J., dissenting).

2. Alternatively, the EEOC attempts to argue the merits of this case and defends the judgment below as correct. Opp. 4-10. In light of the conflict among the circuits, this argument is beside the point. Only this Court can settle the conflict. In any event, because it gave *no* weight to petitioner's First Amendment interests, the decision below is clearly incorrect under the decisions of this Court.[3]

[3] The EEOC completely mischaracterizes petitioner's argument. Petitioner has not sought any "exemption" or "immunity" from any legal proceedings under Title VII. Opp. 4, 9 n.7. Respect for petitioner's First Amendment rights merely requires the EEOC to investigate non-confidential materials first and to make some initial

In arguing in favor of the holding of the court of appeals, the EEOC does not clearly explain its view concerning the scope of or even the existence of any First Amendment protection for academic freedom. Nevertheless, the EEOC does not directly dispute petitioner's argument, set out at some length in the petition (Pet. 13-15),[4] that academic freedom is protected by the First Amendment and that confidential tenure deliberations are a critical element of that right.[5]

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showing of need before issuing a blanket subpoena for confidential tenure materials, such as the one in this case. The fact that Congress extended Title VII to academic institutions (Opp. 6) is thus wholly irrelevant to the narrower issue of what type of protection from discovery these institutions enjoy. On that issue Congress was silent.

[4] The EEOC's suggestion that "academic freedom in its legitimate sense" is limited to "the ability of a scholar to express and examine unconventional ideas without fear of reprisal or censure" (Opp. 7) completely ignores statements by members of this Court consistently identifying the freedom to decide "who shall teach" as one of the four constituent elements of academic freedom protected by the First Amendment. (See cases cited at page 13 of the Petition.)

[5] The EEOC makes a spurious comparison between this case and *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), and claims that rejection of the newsman's claim there warrants rejection of any privilege "for petitioner, whose First Amendment claim here is much more tenuous." (Opp. 6 n.5). This assertion is peculiar in light of the government's complete failure to analyze petitioner's First Amendment claims. Moreover, the reasoning in *Branzburg* supports petitioner. As Justice Powell's pivotal opinion explained, "The asserted claim to privilege should be judged on its facts by the striking of *a proper balance* between [First Amendment] freedom . . . and the obligation of all citizens to give relevant testimony. . . ." 408 U.S. at 710 (emphasis added). In *Branzburg*, reporters refused even to appear before the grand jury. Here, Franklin and Marshall has supplied the EEOC with extensive information in response to the subpoena. In this case, by contrast to *Branzburg*, it is the government which makes the extreme argument that it has no duty to examine initially material already revealed to it or to make any preliminary showing of need before obtaining access to confidential tenure materials protected by the First Amendment.

The EEOC even concedes (Opp. 9) that First Amendment-protected academic rights will be infringed by uncontrolled access to tenure review materials, but maintains that such infringement will be "minimal." This is contrary to common sense. As we indicated in the petition (at 14), this Court has repeatedly recognized that confidentiality is critical to many deliberative activities. As applied in the academic setting, the views of the American Association of University Professors, which itself supports both the need for confidentiality in the tenure process and the need to proscribe invidious discrimination in that process, would seem to be a better guide to follow than the EEOC. In its *amicus* brief, the AAUP argues that "[u]nfettered disclosure of faculty evaluations will thus serve to reduce the reliability of the evaluations themselves to the serious detriment of standards of excellence in higher education." AAUP Br. 12.

Even the Third Circuit in effect conceded that its rule would infringe academic freedom. The court recognized "that confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review." Later, the Court acknowledged that disclosure could lead to "embarrassment, confrontational situations and the fear of less than honest evaluations . . . ." Pet. App. 8a. See also *id.* at 10a.[6]

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[6] Without commenting upon this statement by the court of appeals, the EEOC asserts (Opp. 9) that it will protect the secrecy of petitioner's tenure materials. But the EEOC admits (Opp. 9 n.8) that its regulations authorize disclosure of information to the charging party which renders any promise of confidentiality completely meaningless. Moreover, this Court in other contexts has rejected similar promises of non-disclosure as inadequate to justify unrestrained access to confidential information. See *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983) (fear of inadvertent or illegal release of grand jury materials supports "particularized need" requirement for disclosure to Justice Department Civil Division employees).

This is unquestionably an infringement of the confidential deliberative process.

As we argued in the petition (15-16), if the government's demand for information infringes a constitutional right, this Court has held in a variety of contexts that the government must make some additional showing of need beyond loose relevance to justify the constitutional infringement; a court enforcing a subpoena must give some weight to First Amendment rights.[7] The weakness of the government's position on this point is most clearly revealed in its attempt to defend unlimited access to the confidential files of those candidates for tenure at Franklin and Marshall, other than Montbertrand. The government's "need" is explained (Opp. 7) as necessary to allow the EEOC to "determine whether the asserted reasons for denial of tenure were *pretextual* and, thus, whether there was discrimination against the charging party." This claim places the cart before the horse. Before "pretext" becomes an issue, there must be a *prima facie* showing of discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973). Thus, these materials are not useful in proving the basic discrimination charge. They might be relevant to the case, but only if there is evidence of discrimination. The

[7] The Government's reliance on *Regents* v. *Ewing*, No. 84-1273 (Dec. 12, 1985), is misplaced because it assumes the ultimate issue in this case—that the peer review and promotion or non-promotion of Montbertrand did not involve "genuine avademic decisions." But courts generally should give deference to the academic process unless there has been "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." (Opp. 9 n.7, quoting from *Regents* v. *Ewing*). Nothing in this record suggests any departure, substantial or otherwise, from academic norms. *Ewing* thus undermines the EEOC's position in this case.

EEOC never explains why access to this evidence is needed before any other investigation is undertaken.[8]

The EEOC has completely refused to accept any limitation on its subpoena power.[9] And, only by ignoring petitioner's First Amendment rights can the EEOC and the Third Circuit justify the premature and unnecessary intrusion into petitioner's academic freedom created by the subpoena in this case. Once there is conceded infringement of protected First Amendment activity, the decisions of this Court forbid giving no weight to the right affected as the court of appeals incorrectly did in this case.

[8] The EEOC string cites "numerous cases" where the issue was whether an academic institution's asserted reason for making a particular decision was "pretextual" and the EEOC asserts that those courts reviewed peer review materials "without apparent harm to the peer review process." Opp. 8 n.6. None of these cases involved judicial enforcement of an administrative subpoena seeking confidential tenure materials. Indeed, none of those cases explains how the "peer review materials" were obtained by the private litigant. Moreover, it is not clear that any of the quotations by peers relied upon by the courts in those cases came during the confidential deliberative process or were instead statements made in other contexts. Finally, none of those cases does what the EEOC wants to do here—rely upon peer review materials concerning a candidate *other* than the complaining or charging party. Thus, those cases are wholly irrelevant to any issue in this case.

[9] The EEOC asserts (Opp. 7) that any restriction upon its access to confidential peer review materials would make Title VII enforcement "difficult or impossible." Restrictions on access to tenure review materials have been in effect in at least two circuits in recent years, but the EEOC does not cite even a single instance where the limitation imposed by those courts has in anyway adversely affected its enforcement efforts.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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